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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-866

M.J.D.M. TRUCK RENTALS, INC., AND
WILLIAM V. DEMAIO,
Petitioners,

vs.

WILLIAM J. O'BRIEN,
Respondent.

No. 75-887

THEMIS N. ANASTOS AND
HUGH M. MATCHETT,
Petitioners,

vs.

WILLIAM V. DEMAIO AND M.J.D.M.
TRUCK RENTALS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATEMENT OF THE CASE.

Petitioner, M.J.D.M. Truck Rentals, Inc. ("M.J.D.M."), instituted suit against Hamilton Steel Company ("Hamilton") in 1960 for unpaid truck rentals. *M.J.D.M. Truck Rentals Inc.*

v. *Hamilton Steel Products, Inc.*, No. 60 C 1089. After trial, a judgment was entered for petitioner, execution of which was automatically stayed for ten days, pursuant to F. R. C. P. 62(a). Within that ten day period, Hamilton moved for a new trial. Ten days after the expiration of the automatic ten day stay period, execution on the judgment was stayed by court order. The judgment was subsequently modified by the trial court.

Recordation of the judgment is a step in perfecting a judgment lien in Illinois. M.J.D.M.'s judgment against Hamilton was recorded when the stay order was lifted. However, Hamilton had previously filed under the bankruptcy act and the trustee sought to avoid the lien. In 1967, the Court of Appeals for the Seventh Circuit reviewed the validity of M.J.D.M.'s lien against Hamilton and concluded that it was not valid because no judgment was recorded prior to Hamilton's bankruptcy. *Hamilton Steel Products Co.* v. *Yorke*, 376 F. 2d 463 (7th Cir. 1967).

Three years after the Seventh Circuit's decision M.J.D.M. brought a malpractice action against its former attorney, W. J. O'Brien, for failure to record the judgment. After a verdict in M.J.D.M.'s favor, the Seventh Circuit reversed. Going a step beyond its analysis on the first occasion M.J.D.M. was before it, the Seventh Circuit concluded that, even if the judgment had been recorded, a valid lien under Illinois law would not have been created. The Seventh Circuit, therefore, held that the District Court should have entered a directed verdict for O'Brien in the malpractice action since M.J.D.M. suffered no harm as a result of O'Brien's action in not recording the judgment.[1]

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1. In addition to the petition filed by M.J.D.M., two of M.J.D.M.'s former council also seek review. Although the petition filed by Anastos and Matchett is virtually incomprehensible, it appears to seek review of Anastos and Matchett's right to intervene to protect claims for legal fees.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Seventh Circuit correctly decided that Illinois law requires that a judgment be (1) final and (2) executable if it is to form the basis for an enforceable judgment lien.

2. Whether the courts below correctly denied the petitions to intervene of Anastos and Matchett.

REASONS FOR DENYING THE WRIT.

1. There Is No Conflict in the Decisions of the Seventh Circuit on Any Issue Presented by This Case.

The decision appealed from involves only the narrow application of long-standing Illinois Supreme Court precedent relating to judgment liens. No amount of strained interpretation can convert this into a substantive federal question. Because this case involves only Illinois law, petitioners are obviously unable to find any conflict among the circuit court decisions. Therefore, they have been reduced to asserting the unique argument that certiorari should be granted because there is a conflict between two decisions of the Seventh Circuit relating to Illinois judgment liens. In support of this assertion they cite *Hamilton Steel Products Co.* v. *Yorke,* 376 F. 2d 463 (7th Cir. 1967) and *M.J.D.M. Truck Rentals, Inc.* v. *O'Brien,* 521 F. 2d 1301 (7th Cir. 1975). The petitioners' assertion to the contrary notwithstanding, the Seventh Circuit has indicated that there is no conflict in the holdings of these two cases. See Petition of M.J.D.M. at 4a, fn. 4.

The 1967 case dealt with whether the Federal District Court's order staying execution on the judgment in *M.J.D.M. Truck Rentals* v. *Hamilton Steel Products* had "restrained" M.J.D.M. from recording the judgment against Hamilton. M.J.D.M.

argued that it did, and that therefore the bankruptcy laws should not be applied so as to invalidate the lien of judgment against Hamilton. The court held the stay of execution did not prohibit M.J.D.M. from recording the judgment and that the bankruptcy laws prevented M.J.D.M. from perfecting a judgment lien against the property.

In addition to ruling on the issues presented, the Seventh Circuit in 1967 made several gratuitous statements which have become the underpinnings for the petitioners' argument. The petitioners make much of dicta in the last paragraph of the opinion in *Hamilton* v. *Yorke,* expressing the court's feeling that the judgment should have been recorded. It is abundantly clear from the opinion that the court was not asked to decide whether the judgment, if recorded, would have created a lien. Such an issue was not relevant to the controversy before the court and cannot be said to be any part of the holding of that case.

M.J.D.M. Truck Rentals, Inc. v. *O'Brien,* on the other hand, dealt with whether a judgment, if recorded prior to Hamiltons bankruptcy, would have created a judgment lien. The court, applying Illinois precedent, held it would not because at no time before Hamilton filed for bankruptcy did M.J.D.M.'s judgment possess the necessary requirements of *finality* and *executability.*

2. The Decision of the Seventh Circuit Is Clearly Correct.

After a searching examination of the Illinois precedent dealing with judgment liens, the Seventh Circuit found that to support a lien on real estate in Illinois a recorded judgment must be final and executable. *Noe* v. *Moutray,* 170 Ill. 169, 177, 48 N. E. 709, 712 (1897). See also, *City of Chicago* v. *Hall,* 103 Ill. 342, 348 (1882); *Lehman* v. *Cottrell,* 298 Ill. App. 434, 440, 19 N. E. 2d 111, 114 (1939); R. Kratovil & F. Harrison, Jr., "Enforcement of Judgments Against Real Property," 1951 U. Ill. L. F. 1, 2; 1 Black on Judgments, § 407 (1902); 2

Freeman on Judgments, §§ 929, 930 (1925). Petitioners are unable to cite any case which overturns these authorities.[2]

Citing 9 J. Moore, Federal Practice ¶ 110.08[3] at 120-21 (1973), the Seventh Circuit then found that while post-trial motions were pending, from June 12, onward, the judgment lacked the requisite finality. Petitioners do not challenge the accuracy of Professor Moore's conclusions. Instead, they assert the Seventh Circuit misread Professor Moore. Apparently arguing that a judgment may be "final" for some purposes and not for others, petitioners claim that the cited paragraph refers "only to the *computation of time* for the purpose of conferring jurisdiction on the appellate court . . .". (Petition for Petitioner, M.J.D.M., at 15) (emphasis in original). This simply is not what Professor Moore says.[3]

Even if the petitioners' contention that this section of Professor Moore's treatise was misused is correct, they would gain nothing. They can find no support for their primary assertion that an Illinois judgment may be final for purposes of creating a lien and interlocutory for other purposes. Illinois law requires that a judgment sufficient to give rise to a lien must be a final judgment. It does not seek to distinguish between the various factors contributing to the lack of finality. Nor does it seek to distinguish between different types of final judgments.

At the conclusion of their argument, petitioners cite *Reconstruction Finance Corp.* v. *Maley*, 125 F. 2d 131, 133 (7th Cir. 1942); *In re Lake County Fuel and Supply Co.*, 70 F. 2d 391 (7th Cir. 1934); *Holmes* v. *Fanyo*, 326 Ill. App. 624, 63 N. E. 2d 249 (2d Dist. 1945), as being in conflict with the Seventh Circuit's holding that "any recording while a stay of execution order was in effect would not have created a valid lien." The kindest thing that may be said in response to this is

2. They cite *Curtis* v. *Root*, 28 Ill. 367 (1862). To the extent that case may be relevant, it has been implicitly overruled by the cases cited above.

3. See 9 J. Moore, Federal Practice ¶ 110.08[3] at 120 fn. 2 (1973).

that these cases do not deal with any issue raised in the present case. These cases deal with the time a judgment lien will remain in effect pursuant to Illinois Revised Statutes Ch. 77 § 1 (1973).

3. Petitioners Anastos and Matchett Have No Interest in This Appeal.

Petitioners Anatos and Matchett were denied leave to intervene by the District Court and the Circuit Court of Appeals. They have filed a brief raising a number of issues relating to the merits of Judge Stevens' decision, as well as the denial of their petition to intervene. Some of the issues raised by these petitioners have already been raised by M.J.D.M. and have been discussed *supra*. However, as a matter of law, petitioners Anastos and Matchett are precluded from raising any issues except the denial of their petition to intervene. See, *United Auto Workers* v. *Scofield*, 382 U. S. 205, 209 (1965); R. Stern & E. Grossman, Supreme Court Practice, 282-83 (4th Ed. 1969) (and cases cited therein).

Petitioners assert a right to intervene to protect a claimed statutory lien on the judgment in *this case*. Petitioners are unable to state how that alleged statutory lien arose. Indeed, their assertion is totally unsupported by any authority.

For the foregoing reasons, respondent respectfully submits that the petitioners have failed to raise any important federal question appropriate for resolution by this Court. The petitions should be denied.

Respectfully submitted,

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